

TEH GUAN TEIK

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V.

INSPECTOR-GENERAL OF POLICE & ANOR

FEDERAL COURT, KUALA LUMPUR

b

LAMIN MOHD YUNUS PCA

PEH SWEE CHIN FCJ

ZAKARIA YATIM FCJ

[CIVIL APPEAL NO: 01-3-1997 (N)]

20 MAY 1998

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ADMINISTRATIVE LAW: *Public servants - Remedies - Dismissal of police officer - Action against Government - Proper procedure - Whether by way of certiorari or declaration or either - Right to sue by declaration - Whether a deeply entrenched right - Rules of the High Court 1980, O. 15 r. 16, O. 53*

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The appellant, a police sergeant in the employ of the second respondent, filed a writ action against the respondents claiming *inter alia* for declarations that his dismissal was without just cause and excuse, and without any lawful justification or fair play, and that he was still a police officer holding the rank of a sergeant. The declarations sought were granted by the High Court, which made an order in terms of the appellant's prayers. The respondents appealed to the Court of Appeal and argued therein, for the first time, and by way of preliminary objection, that the appellant, in seeking the declarations, had adopted the wrong procedure, and that, rightly, he ought to have proceeded by way of *certiorari* under O. 53 Rules of the High Court 1980 ('the RHC'). The Court of Appeal, in ruling that the High Court had no jurisdiction to entertain the claim for declaration, upheld the preliminary objection, and on that ground allowed the respondents' appeal without hearing the merits of the appellant's claim. The appellant applied to the Federal Court for leave to appeal against the decision of the Court of Appeal, and leave having been granted, an issue arose before the learned appellate judges as to whether a police officer, having been dismissed from service by a disciplinary body, could challenge the decision by way of declaration or *certiorari* or either.

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Held:

Per Lamin Mohd Yunus PCA

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- [1] As declaration and *certiorari* are concurrent remedies, the Court of Appeal was utterly out of place in reversing the decision of the High Court without considering the merits on the strength of the declaration applied for. The Court of Appeal could have considered whether the dismissal “was without reasonable cause or excuse” or “without lawful

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- a* justification or fair play” in the light of the charges that had been preferred and finding made after the trial before the tribunal. Witnesses were also called before the High Court, and the Court of Appeal, therefore, ought to have considered whether the learned judge below had made a correct finding that the dismissal “was without reasonable cause or excuse” or “without lawful justification or fair play” and that declaration could issue.
- b*

Per Peh Swee Chin FCJ

- c* [1] In the instant case, the appellant claimed that the termination of his employment was without fair play, *inter alia*. Fairplay is synonymous with fairness, and fairness has been used by the courts in a number of cases as meaning natural justice. Thus the words “absence of fairplay” used in connection with the termination of service are a sufficient invitation to the court for judicial review. The hearing in the High Court in this instant case, indeed, was conducted expressly on the basis of a
- d* judicial review with no objection from anybody that the basis had been wrong or otherwise improper.
- e* [2] The view of the Court of Appeal that the procedure by way of declaration was wrong, and that the correct way was by way of *certiorari* is totally against the weight of authorities and established principles. Order 15 r. 16 of the RHC is statutory authority for the right to sue by declaration, and makes it a point that it shall not be open to objection even where no consequential relief is sought. The remedies of *certiorari* and declaration, therefore, are available concurrently.
- f* [2a] The principle that declaration and *certiorari* are not mutually exclusive and are concurrent remedies has been strongly entrenched in our law. It would require clear and strong words from a statute to dislodge such a remedy by declaration from its entrenched position.
- g* [3] A claim for declaration, though lacking coercive force by itself, is a very efficient remedy for an aggrieved citizen against *ultra vires* actions of public authorities or governmental bodies. The private citizen therefore ought to be allowed to circumvent the limitations of time inherent in the application for *certiorari* by claiming for declaration instead. To
- h* disallow such application for declaration would result in the court failing to serve the interest of justice, as many citizens, on account of their lack of expertise in the law of *certiorari*, would be barred from seeking justice in the court of law.

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[4] Since the preliminary objection was the only question meant by the parties to be heard by the Court of Appeal, any proposal for a hearing *de novo* before the Court of Appeal is therefore out of place. a

[Appeal allowed; order of Court of Appeal set aside; order of High Court restored.] b

[Bahasa Malaysia Translation Of Headnotes]

Perayu, seorang sarjan polis dalam perkhidmatan responden kedua, telah memfailkan tindakan writ terhadap responden-responden, dan menuntut antara lain untuk perisytiharan bahawa pemecatan jawatannya adalah tanpa sebab dan alasan yang wajar, tanpa justifikasi yang sah atau keadilan, dan bahawa beliau masih lagi seorang pegawai polis berpangkat sarjan. Perisytiharan yang dipohon telah dibenarkan oleh Mahkamah Tinggi, yang kemudiannya membuat perintah mengikut permohonan spesifik perayu. Responden-responden merayu kepada Mahkamah Rayuan dan berhujah di situ, buat pertama kalinya dan melalui bantahan awal, bahawa perayu, dalam memohon perisytiharan, telah memilih prosedur yang salah, dan bahawa prosedurnya yang betul ialah untuk beliau memohon *certiorari* di bawah A. 53 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Mahkamah Rayuan, dalam membenarkan bantahan, memutuskan bahawa Mahkamah Tinggi tiada bidangkuasa untuk melayani tuntutan untuk perisytiharan, dan seterusnya membenarkan rayuan responden tanpa mendengar merit tuntutan perayu. Perayu memohon kepada Mahkamah Persekutuan bagi kebenaran untuk merayu terhadap keputusan Mahkamah Rayuan, dan, berikut pemberian kebenaran, satu isu telah berbangkit di hadapan hakim-hakim rayuan yang bijaksana, iaitu, samada seorang pegawai polis, yang telah dipecat dari perkhidmatannya oleh satu badan tatatertib, boleh mencabar keputusan tersebut melalui perisytiharan atau *certiorari* atau melalui salah satu dari cara-cara tersebut. c
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Diputuskan:

Oleh Lamin Mohd Yunus PMR g

[1] Oleh kerana perisytiharan dan *certiorari* merupakan remedi bersama, Mahkamah Rayuan silap bilamana mengakas keputusan Mahkamah Tinggi tanpa memberi pertimbangan kepada merit berdasarkan kekuatan perisytiharan yang dipohon. Mahkamah Rayuan boleh menimbang samada pemecatan berkenaan "adalah tanpa sebab dan alasan yang wajar" atau "tanpa justifikasi atau keadilan" dalam konteks pertuduhan dan keputusan yang dibuat berikutan perbicaraan di hadapan tribunal. Saksi-saksi juga telah dipanggil di hadapan Mahkamah Tinggi, dan oleh yang demikian, Mahkamah Rayuan seharusnya mempertimbang samada hakim yang bijaksana di bawah telah membuat keputusan betul bilamana h
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- a* beliau mendapati bahawa pemecatan “adalah tanpa sebab dan alasan yang wajar” atau “tanpa apa-apa justifikasi atau keadilan” dan bahawa peristiharan boleh dibenarkan.

Oleh Peh Swee Chin HMP

- b* [1] Dalam kes semasa, perayu antara lain menuntut bahawa penamatan perkhidmatannya dibuat tanpa ‘fairplay’. ‘Fairplay’ adalah sinonim dengan ‘fairness’ dan ‘fairness telah digunakan oleh mahkamah dalam banyak kes sebagai bermaksud ‘natural justice’ atau keadilan asasi. Dengan demikian, perkataan “absence of fairplay” jika dihubungkan dengan penamatan perkhidmatan adalah mencukupi bagi menjemput mahkamah untuk melaksanakan kajian semula kehakiman. Malahan, pendengaran kes semasa di Mahkamah Tinggi adalah dibuat berdasarkan kajian semula kehakiman dan tiada siapapun membantah bahawa dasar tersebut salah ataupun tidak teratur.
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- d* [2] Pandangan Mahkamah Rayuan bahawa prosedur perisytiharan adalah prosedur yang salah, dan bahawa prosedur yang betul ialah *certiorari* adalah bertentangan dengan autoriti dan prinsip-prinsip terpakai. Aturan 15 k. 16 adalah autoriti statutori bagi hak untuk mendakwa melalui perisytiharan, dan menetapkan bahawa ianya tidak terbuka kepada apa-apa bantahan walaupun tiada relif ‘consequential’ dipohon. Relif *certiorari* dan perisytiharan, dengan itu, boleh dipohon secara ‘concurrent’ atau bersama.
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- f* [2a] Prinsip bahawa *certiorari* dan perisytiharan bukan saling eksklusif dan adalah remedi bersama telah terpacak kukuh dalam undang-undang kita. Perkataan-perkataan yang jelas dan kental dalam statut adalah diperlukan bagi menanggalkan remedi melalui perisytiharan sedemikian dari tunjangnya.
- g* [3] Walaupun sesuatu tindakan perisytiharan itu, secara sendiriannya, tidak mempunyai kuasa paksaan, ianya adalah satu remedi yang sangat cekap yang boleh diperolehi oleh seseorang yang tersinggung terhadap tindakan-tindakan *ultra vires* pihak berkuasa awam serta badan-badan kerajaan. Orang ramai, dengan itu, harus dibenarkan untuk memintas penghadan masa yang terserlah dalam permohonan *certiorari* dan sebaliknya
- h* memohon perisytiharan. Tidak membenarkan permohonan sedemikian akan menggagalkan usaha mahkamah untuk menegakkan keadilan, oleh kerana ramai orang, disebabkan ketidakmahiran mereka dengan undang-undang *certiorari*, akan disekat dari mendapatkan keadilan di mahkamah undang-undang.
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[4] Oleh kerana bantahan awal merupakan satu-satunya persoalan yang diminta oleh pihak-pihak untuk didengar oleh Mahkamah Rayuan, sebarang cadangan untuk pendengaran *de novo* di hadapan Mahkamah Rayuan adalah tidak kena pada tempatnya. a

[Rayuan dibenarkan; perintah Mahkamah Rayuan diketepikan; perintah Mahkamah Tinggi dikekalkan.] b

Cases referred to:

Barnard & Ors v. National Dock Labour Board [1953] 2 WLR 995 (**fol**)
Datuk Syed Kechik v. Government of Malaysia & Sabah [1979] 2 MLJ 101 (**refd**)
Davis v. Galmoye [1888] 39 Ch D 322 (**refd**) c
Dyson v. Attorney General [1911] 1 KB 410 (**refd**)
Healey v. Minister of Health [1954] 3 WLR 222 (**refd**)
Mahan Singh v. Government of Malaysia [1978] 2 MLJ 133 (**refd**)
Mohamed Nordin Johan v. Attorney-General Malaysia [1983] 1 CLJ 130 (**refd**)
Mohd Ahmad v. Yang Di Pertua, Majlis Daerah Jempol [1993] 3 CLJ 135 (**cit**)
O'Reilly v. Mackman [1982] 3 All ER 1124 (**not foll**) d
Pyx Granite Co Ltd v. Ministry of Housing & Local Government [1960] AC 260 (**refd**)
Ridge v. Baldwin [1963] 2 All ER 66 (**refd**)
Sri Lempah Enterprise Sdn Bhd v. Pengarah Tanah & Galian Wilayah Persekutuan [1979] 1 MLJ 153 (**refd**)
Sugumar Balakrisnan v. Chief Minister of the State of Sabah & Anor [1989] 1 MLJ 233 (**refd**) e
Sungai Wangi Estate v. UNI [1975] 1 MLJ 136 (**refd**)
Surinder Singh Kanda v. Government of Federation of Malaysia [1962] 28 MLJ 169 (**refd**)
Vine v. National Dock Labour Board [1957] 2 WLR 106 (**fol**) f

Legislation referred to:

Federal Constitution, arts. 132, 135(1), (2)
 Rules of the High Court 1980, O. 15 r. 16, O. 53
 Rules of the Supreme Court [UK], O. 53
 Town and Country Planning Act 1947 [UK], s. 17

Other source referred to:

Administrative Law, Prof Wade, 6th edn, p 678 g
 For the appellant - Karpal Singh (Christopher Fernando, Maniam Rao & Gobind Singh Deo with him); M/s Aris Rizal Christopher Fernando & Co
 For the respondents - Abu Bakar Jais SFC h

[Appeal from Court of Appeal; Civil Appeal No: N-01-7-94]

Reported by Nik Aras Yusof

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JUDGMENT

Lamin Mohd Yunus PCA:

b On 20 January 1998 we sat to hear the instant appeal to decide the following question: “What is the correct procedure for a police officer dismissed by a disciplinary body to challenge the decision ie, whether by way of declaration or *certiorari* or either.”

The short answer is in the opinion of the Privy Council in *Surinder Singh Kanda*’s case [1962] 28 MLJ 169 (at p. 173) expressed by Lord Denning thus:

c Their Lordships notice that before Rigby J, it was suggested that the only remedy was by *certiorari*. But their Lordships agree with him that the remedy by declaration is available also.

d In this case the Privy Council had to decide the question of dismissal of a Police Inspector which had to call in for interpretation of art. 135(1) of the Federal Constitution. In the case of *Mahan Singh v. Government of Malaysia* [1978] 2 MLJ 133, again the Privy Council had to decide the fate of another employee in the service of the Federal Government holding the post of Senior Registrar of the Sessions Court. He was “pensioned off in the Public Interest” and he had not reached the compulsory retirement age of 55. On the facts of the case, the relevant question was whether it was a dismissal and if so whether he had been given “a reasonable opportunity of being heard” within the meaning of art. 135(2) of the Federal Constitution. To examine whether this rule of natural justice has been complied with, a declaration was applied for. The High Court granted the declaration for the reason that the termination of the services of Mahan Singh had breached art. 135(2) and therefore void. *e* The Federal Court disagreed and on appeal to the Privy Council the Council favoured the decision of the High Court. In *Sungai Wangi Estate v. UNI* [1975] 1 MLJ 136, an employee of the estate was dismissed by giving him one month’s salary in lieu of notice. The matter was referred to the Industrial Court which decided that there was condonation by the applicant/employer. The applicant applied by originating summons for a declaration that there was an error on the face of the record of the Industrial Court. The court refused to grant the declaration as there was only “mere error of law on the face of the record” which did not result in any jurisdictional defect. The learned judge was of the view that the correct and appropriate procedure in such a case was to apply for an order of *certiorari* to quash the award. Eusoffe Abdoolcader J (as he then was) said (at p. 137):

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Certiorari will lie to quash a decision for want or excess of jurisdiction, breach of the rules of natural justice, error of law on the face of the record and fraud or collusion. There is now ample authority demonstrating that a declaration of invalidity is obtainable for jurisdictional defects and breaches of natural justice, in such cases as, for example, where an interested party has not been joined or heard, resulting in a decision or determination being a nullity (*Ridge v. Baldwin*). The position however seems to be somewhat different where the only defect is an error of law on the face of the record not going to jurisdiction. Such a decision is voidable and not void and logically a voidable decision cannot be declared invalid, as such a declaration will not state that the decision never had any effect but rather that it is ineffective as from the date of the declaration.

The opinion of the Privy Council in *Surinder Singh Kanda* was not cited before his Lordship. It was not done perhaps for the reason that in *Surinder*, it involves a person in the service of the Government which to my mind should not be viewed with a difference since observations on *certiorari* and declaration being concurrent remedies were made. The learned judge made a further distinction thus (at p. 139):

In other words, the court can grant a declaration only where a decision which has been impugned is without jurisdiction and void, but not where it is within jurisdiction and merely voidable.

The learned judge continued:

It would therefore appear to me to be clear on the authorities which I have discussed and notwithstanding the equivocal decision in *Taylor v. National Assistance Board, supra*, that I am precluded from making the declaration sought for mere error of law on the face of the record which does not result in any jurisdictional defect so as to make the award of the Industrial Court a nullity. The correct and appropriate procedure would in the circumstances have been an application for an order of *certiorari* to quash the award, and in my view *certiorari* would indeed have been the only remedy available to the applicant.

In the case of *Mohamed Nordin b. Johan v. Attorney-General Malaysia* [1983] 1 MLJ 68, the Federal Court was not dealing with the problem of termination of employment or dismissal but with the propriety of the issuance of the two certificates by the Attorney-General on an application for an order of *certiorari* to have them quashed, Raja Azlan Shah Ag. LP (as he then was) said:

We think that in the circumstances of this case *certiorari* is the appropriate remedy to be sought and not a declaration, and we need only refer to the judgment of Abdooldader, J in *Sungai Wangi Estate v. Uni ...*

- a* Going through the authorities, it does not appear to me to be without difficulty to decide when the application of *certiorari* is more appropriate and when it is not. Perhaps an amendment to the rules of court and the Specific Relief Act may assist to resolve some of the problems in this area to avoid injustice caused to both employees and employers. For the moment, I concur with my learned brother Peh Swee Chin, FCJ.
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- However the Court of Appeal in the instant appeal before us made short work of the case before it with its swift pronouncement to the effect that as the officer (the appellant before us) had adopted the wrong procedure (ie, by applying for a declaration and not for an order of *certiorari*) and the court decided purely as a preliminary issue that the appeal must be allowed (without considering the merits of the appeal). The reason for so doing, in its view, was that a declaration would not be capable of quashing the decision of the inferior tribunal and only *certiorari* would be capable of doing so. The court said with respect that if the declaration was allowed to stand, the decision of the tribunal would remain as it had not been quashed. Then it said that there would be two “inconsistent decisions one by the inferior tribunal and the other by the court.” In this case there was no way for the appellant to apply for *certiorari*. He must first apply for leave which can only be done within six weeks from the date of his dismissal. He was late by 13 months.
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- e* I am however tempted to observe one other point arising out of this case and that is on the question of whether an appellate court should entertain a preliminary objection or issue brought before it for the first time. Before the High Court, of course the appellant did not apply for an order of *certiorari* perhaps because he was out of time but filed a writ praying for a declaration instead. That was not objected to by the Senior Federal Counsel. He only did it before the Court of Appeal as a preliminary issue. In the case of *Davis v. Galnmoie* [1888] 39 Ch. D 322, the plaintiffs took out a summons against the defendant for leave to issue a writ of attachment for his contempt in not having complied with an order of 11 December 1886. Mr. Justice North, in chambers, made the order as applied for by the summons. No objection was made to exercise the jurisdiction in chambers. On appeal before the Court of Appeal, an objection was taken in that the leave to issue the writ of attachment ought not to have been given in chambers as an order to commit to prison had always been made to a judge in open court. Cotton LJ (sitting with Fry LJ) said “that as the objection had not been raised before Mr. Justice North the defendant was not entitled to raise it on appeal.” But, he continued, as the point had been argued, he thought it right to state his opinion that the application for leave to issue a writ of attachment ought to have been made by motion in open court, and not by summons. The appeal was dismissed as the court found that on the merits there was no ground for interfering with
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the discretion exercised by Mr. Justice North. In the instant appeal before us, as we favour the proposition that declaration and *certiorari* are concurrent remedies, all the more so I am of the view, with respect, the Court of Appeal was utterly out of place to reverse the decision of the court below without considering the merits on the strength of the declaration applied for. The court could have considered whether the dismissal “was without reasonable cause or excuse” or “without lawful justification or fair play” in the light of the three charges having been preferred and finding made after a trial in the Orderly Room Proceeding. Before the High Court witnesses were called including the Pengadil (SB1) of the Orderly Room Proceeding. The Court of Appeal ought to have considered whether the learned Judge below had made a correct finding that the dismissal “was without reasonable cause or excuse” or “without lawful justification or fair play” and that declaration could issue.

Our function in the present appeal is limited to within the confines of the question as formulated for the purpose of the leave as granted and not in the nature of a rehearing of the whole case and therefore I am constrained to even suggest the proper outcome of this case on the evidence available before the High Court.

As regards the conclusion of this appeal I go along with my learned brother Peh Swee Chin, FCJ in that I would allow the appeal and on the same terms.

Peh Swee Chin FCJ:

This appeal concerns a public officer viz, a police sergeant, who filed a writ action in High Court for the following prayers, *inter alia*, as follows:

- (i) A Declaration that the termination of Plaintiffs employment to be without any reasonable cause or excuse and without any lawful justification or fair play.
- (ii) A declaration that the Plaintiff is still a Police Officer holding the rank of a Sergeant of the Defendants without any loss in remuneration, seniority and other pecuniary rights afforded to him in Law.
- (iii) Reinstatement to his former position in the Police Force without loss of any benefits, monetary or otherwise or whatsoever.

and costs.

The High Court, at the end of a hearing made the order in terms of the specific prayers of the police sergeant set out above. The plaintiff there, ie, the police sergeant is hereafter called the police sergeant.

- a* On appeal to the Court of Appeal by Inspector General of Police and Kerajaan Malaysia, the appeal was allowed and the order of the High Court was set aside purely on a procedural point, agreed as a preliminary issue or objection which was to the effect that wrong procedure was adopted by the police sergeant in filing an action for declarations that the termination of his employment from the police force was without “lawful justification or fair play” etc, that he was still “a police officer” and for “reinstatement”.
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- The preliminary objection was upheld and that the appeal was allowed without the Court of Appeal hearing it on merits. To quote, the lower Court said “... we are inclined to hold that the respondent’s action herein is nothing more than an appeal from a decision of the inferior tribunal in the guise of a writ for a declaratory judgment. ... It must be clear that the High Court has no jurisdiction to substitute its own opinion or question of fact from that of the inferior tribunal nor is it at liberty to act as an appellate court against the inferior tribunal on question of facts.” The lower Court seems to have solely relied on only one reported case for its decision ie, *Healey v. Minister of Health* [1954] 3 WLR 222 (High Court); [1954] 3 WLR 815 (Court of Appeal); also in [1955] 1 QB 221. (Court of Appeal).
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- The police sergeant applied to the Federal Court for leave to appeal against the decision of the Court of Appeal and leave was granted but limited to one issue viz. as to “what is the correct procedure for a police officer dismissed by a disciplinary body to challenge the decision ie, whether by way of declaration or *certiorari* or either”. Thus the matter has come to us.
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- To revert to the case of Healey as relied on solely by the Court of Appeal, a shoemaker was employed by a hospital management committee in the shoemaker’s shop of a mental hospital, the said shop having provided occupational therapy for the patients. The plaintiff ie, the shoemaker, claimed from the Minister (for more favourable terms of superannuation) for a declaration, that he was a mental health officer within the meaning of the words in “National Health Service (Superannuation) Regulations 1950.” The Minister, by a letter, informed him that he was not such an officer. He filed an action for the declaration in High Court against the Minister that he was such a mental health officer. The Minister replied in court that High Court had no jurisdiction and that the statement of claim disclosed no cause of action.
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- The High Court in the cited case held in refusing the claim for the declaration, that the plaintiff’s claim he was a mental health officer, within the definition of a mental health officer” under the said legislature was in effect an appeal from the determination of the Minister, and such appeal was not provided by the said regulations. The learned judge said at p. 226 *ibid*, to the effect with
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regard to the said decision of the Minister and also to the defence of the Minister in the High Court, that the plaintiff's claim had disclosed no cause of action: **a**

He has determined that the plaintiff is not a mental health officer within the meaning of those regulations. Can that determination be reviewed by a court of law? It is to be noted that the statement of claim does not allege that the defendant had no jurisdiction to do what he did, or that he acted *ultra vires*, or that he misconstrued the Act and the regulation, or that he acted contrary to the principles of natural justice, or that he was biased, or that there was error of law on the face of the decision. In effect, the plaintiff wants to contend in the action that the defendant determined wrongly, and he want the court to declare accordingly, or it may be said that the plaintiff is appealing against the determination of the defendant, notwithstanding that no appeal is provided for either in the Act or in the regulations. **b**
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It will have been observed that the statement of claim in that cited case was so narrowly drafted as to preclude the High Court from judicially reviewing the decision of the Minister. **d**

The Court of Appeal in England dismissed the appeal, the headnote of the Weekly Law Reports for this case is very illuminating and pithily accurate and it is reproduced in full below:

Held, that, the plaintiff by his pleading not having asked for a declaration that the Minister's determination was invalid or asserted that the determination of the Minister was wrong in law or that the Minister lacked jurisdiction, but having invited the court to assume an appellate jurisdiction, which it had not been given and could not create, the appeal must be dismissed. **e**

Lord Denning in that case said: "At one stage in the argument Mr. O'Connor sought leave to amend and claim a declaration that the Minister's decision was void, but he had to concede that it was too late to amend now for the purposes of the preliminary issue". **f**

I have highlighted the above portions which indicate the eye of the storm amidst much argument and citation of cases and it should be obvious to anyone that in so far as the plaintiff in that cited case sought in fact for court's judicial review of the decision of the Minister of Health, the pleading was defective as it was far too nebulous for the learned Judge to step in boldly on or for a judicial review and I venture to suggest, especially when "justice" of the case, had not been in any sense overwhelming for the plaintiff there. Conceivably *inter alia*, a "mechanic" for making dentures in a hospital in a similar and hypothetical situation could not, with much hope of success claim to be a dental officer of the hospital. Conceivably also the Court of Appeal in England seems to have held that an ordinary action when not stated as an invitation to the court for judicial review, either expressly or by necessary implication, can not be converted into a proceeding for judicial review. **g**
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- a* In the instant case, the police sergeant claimed that the termination of his employment was without fair play, *inter alia*. He did not say that the termination of employment was “invalid” or “void”, or the words “the dismissal from service” instead of “termination of employment”, the last-mentioned words having been used by him. Yet fair play is synonymous with
- b* fairness. Fairness has been used by the courts in a number of cases as meaning natural justice, though I prefer personally the express use of the words of “natural justice” so that one could fall back undoubtedly on the function to ascertain if there is the substantial compliance with the twin rules of natural justice.
- c* Thus the words, “absence of fair play” used in connection with the termination of service in my view are a sufficient invitation to the court for judicial review, quite apart from the “traditional” prayers that “he is still a police officer” or that “he be reinstated” in a writ action by a public officer categorised under art. 132 of the Federal Constitution, see *Mohd bin Ahmad v. Yang Di Pertua, Majlis Daerah Jempol* [1993] 3 AMR 2129. I have dealt with this at some
- d* length to show that the words “without fair play” would attract judicial review though there is no use of the word “invalid” as mentioned by Lord Denning in statement of claim in the instant case.
- e* The hearing in the High Court in this instant case was conducted expressly on the basis of a judicial review with no objection from anybody that the basis had been wrong or otherwise improper. Please see the notes of evidence and proceedings at p. 49 of the Appeal Record.
- f* In the instant case the preliminary issue about the High Court having no jurisdiction to enter the claim by a writ of action for those declaration aforesaid (instead of applying the “correct” procedure for order of *certiorari*) was raised for the first time in the Court of Appeal and of course, we accept that the plea could be raised on appeal for the first time because it related to jurisdiction.
- g* Before us, learned counsel for Inspector General of Police and another persisted which the line of argument based on the ratio of the Court of Appeal in the instant case ie, that the correct procedure should have been an application for order of *certiorari* as provided under O. 53 of the Rules of High Court. No authority was cited by him. Learned counsel for the police sergeant on the
- h* other hand, relied on the well-known cases of *Surinder Singh Kanda v. Government of Federation of Malaya* [1962] MLJ 169, being a Privy Council appeal from the then Malaya in which Lord Denning held, in an action for declaration that the dismissal of a police inspector was void, that the Privy Council agreed with the view of the High Court in that case below that the
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remedy by way of declaration was also available to the inspector as well as the remedy by *certiorari*. Lord Denning was delivering the opinion of the Board. Learned counsel for the police sergeant also relied on *Sugumar Balakrisnan v. Chief Minister of the State of Sabah and Anor* [1989] 1 MLJ 233 in which it was held that the fact that the remedy of *certiorari* was available to the plaintiff then could not debar him from claiming the remedy of declaration and both were concurrent remedies.

Was the Court of Appeal correct in holding the way it did as stated above ie, that the procedure by way of declaration was wrong, and that the correct way was by way of *certiorari*?

With very great respect, the view of the Court of Appeal is totally against the weight of authorities and established principles.

First and the foremost, O. 15 r. 16 of the Rule of High Court 1980 says: “No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of rights whether or not consequential relief is or could be claimed”. Order 15 r. 16 is statutory authority for a right to sue by declaration, and as if to exalt such right, it says it shall not be open to objection even no consequential relief is sought.

On this O. 15 r. 16, Abdoolcader J, (as he then was) in *Sungai Wangi Estate v. Uni* [1975] 1 MLJ 136, stated that the rule “has the widest application. ... It does not prescribe any procedure nor is it limited to any specific matter. It applies to all proceedings for declaration ... when no special procedure is laid down, the claim for a declaratory judgment is brought by way of a writ.”

Loe Hun Hoe CJ in *Datuk Syed Kechik v. Government of Malaysia and Sabah* [1979] 2 MLJ 101, said “The prevailing view seems to be that the court’s, jurisdiction to make a declaratory order is unlimited subject only to its own discretion.”

This rule or its predecessor by a different numerical nomenclature, appears to have been brought into the justice system in the last century in the United Kingdom to provide another private law remedy, (private law being concerned with the laws of contract, and tort and the like). This private law remedy was adopted by the courts as a public law remedy for judicial review, (public law being concerned with rights and liabilities of various organs of the government against a private citizen). Such an adopted public law remedy has not only become very popular but has been entrenched strongly in our law. It is so entrenched that a provision of another statutory remedy for a claimant is no bar to an action by the same claimant for a declaration, per Raja Azlan Shah

- a* CJ (as he was then) in *Sri Lempah Enterprise Sdn. Bhd. v. Pengarah Tanah and Galian Wilayah Persekutuan* [1979] 1 MLJ 153, 148. Declaration, like all other remedies of judicial review is of course, a discretionary remedy.
- To dislodge such a remedy by declaration from its entrenched position, it would require clear and strong words from a statute. Thus, some dictum in
- b* this connection bears repetition, it says: "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words". This was made by Viscount Simonds in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] AC 260, 286 who described the
- c* principle as a "fundamental rule from which I would not for my part, sanction any departure".
- Lord Denning in *Surinder Singh Kanda supra* in the Privy Council also agreed with the trial judge below and referred to the effect that both remedies of
- d* *certiorari* and declaration were available concurrently. In the case in which a police inspector claimed for a declaration that his dismissal was void, and the Privy council allowed his appeal and granted the said declaration.
- Any random check of our law reports for practically every year since *Surinder Singh Kanda supra* and *Ridge v. Baldwin* [1963] 2 All ER 66, HL, will reveal
- e* cases of government servants seeking declaration that their dismissals were void in which no shadow of doubt has been cast on the propriety of seeking such a declaration instead of a *certiorari*. It will be unnecessary to cite them one by one.
- f* The entrenched principle that declaration and *certiorari* are not mutually exclusive and are concurrent remedies was asserted several times pointedly in the United Kingdom followed by our courts.
- The first is *Barnard and Others v. National Dock Labour Board* [1953] 2 WLR 995. A port manager was alleged and found to have no authority to
- g* suspend the registered Port workers/plaintiffs from work and pay. The plaintiffs sued for a declaration that the said suspension was *ultra vires* and invalid.
- The defendant raised also a preliminary point that the High Court had no jurisdiction to adjudicate on the matter by declaration and that it could only
- h* be done by *certiorari*. It appears that plaintiffs discovered the position of the lack of authority of the port manager 2½ years after the said suspension, long after the time limit for applying for *certiorari*. The Court of Appeal unanimously held that the court had jurisdiction to grant a declaration, overruling the preliminary objection or point. Lord Denning said at p. 1009 *ibid*: "If the tribunal does not observe the law, what is to be done? The remedy
- i* by *certiorari* is hedged round by limitation and may not be available. Why then should not the court intervene by declaration and injunction?"

The next is *Vine v. National Dock Labour Board* [1957] 2 WLR 106, in which the plaintiff claimed for a declaration that his dismissal was void, *ultra vires* and illegal. A preliminary point from the defendant that the claim was incompetent and the only remedy was by *certiorari* was raised and dismissed. The House of Lords upheld the decision and held that the court had jurisdiction to grant the declaration.

Yet another is the case of *Pyx Granite supra*. Pyx claimed declarations in court that certain ministerial decisions were invalid in regard to their proposed development of their land. The Minister raised objection that the court had no jurisdiction to grant a declaration asked for, on the ground also Pyx should have applied to the local authority to determine the proposed development under s. 17 of the Town and Country Planning Act 1947. It was held that the provision of an alternative method of having the question determined did not preclude the court from granting declaration. Viscount Simonds made in the course delivering judgment the dictum cited earlier. Lord Goddard in the same case who dealt with the argument advanced that if there was a remedy in the High Court, it must be by way of *certiorari* and not by declaration had this to say at p. 290 *ibid*:

I know of no authority for saying that if an order or decision can be attacked by *certiorari*, the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive

In passing also in order to lay any possible spectre of any future contention of *per incuriam* against the present decision of this court for not mentioning the case of *O'Reilly v. Mackman* [1982] 3 All ER 1124, which held the litigant in that case to a remedy of *certiorari* and not allowing the remedy of declaration, I will say a few words about this case.

Of course, it was feared that the remedy of declaration would virtually destroy the remedy of *certiorari* by replacing the latter and this, *inter alia*, led in 1977 to the law reform as embodied in O. 53 of Rules of Supreme Court of England which is different from our own O. 53 of the Rules of High Court 1980. The O. 53 of England brought 10 main changes to the earlier O. 53 according to the White Book of 1979 at p. 842 please see the changes set out there. The House of Lord's decision of *O'Reily v. Mackman*, in interpreting such changes, brought about by the law reform has, according to the guru of administrative law, Prof Wade in "*Administrative Law*" 6th Edn. at p. 678, caused "great uncertainty and "a serious setback for administrative law". The decision expressly was not followed for obvious reason in our courts eg, in *Sugumar case supra* and it was also not followed by the Court of Appeal of Singapore. The decision is not relevant to us and need not be discussed further, based as it was on the law reform which we have with all the deliberateness not adopted in our Rules of High Court 1980.

- a* I would like to make a general observation before I end this judgment of mine, ie, that claim for a declaration is a very efficient remedy for an aggrieved citizen against *ultra vires* actions of all public authorities or governmental bodies. It has no coercive force by itself, *inter alia*, so that no such a governmental body need feel the threat of such force. Thus if a person's rights
- b* are affected by an order from such a public authority, he can sue for a declaration of the impropriety of the said order and if he succeeds he can ignore the said order with impunity; see *Dyson v. Attorney General* [1911] 1 KB 410; or if a government servant categorised under art. 132 of the Federal Constitution is dismissed from his post, he can claim a declaration that he still holds it. See *Surinder Singh Kanda supra*.
- c*

- If the private citizen were not to be allowed to circumvent the limitations of time for applying etc, of the *certiorari* by claiming for declaration instead, it would not be difficult to imagine how many such citizens could be, due to lack of expertise in the law of *certiorari*, be barred from seeking justice and
- d* the court would have failed to live up to the image the public have of being an institution of the people to serve the people in the interest of justice.

- Since the preliminary point or objection related to jurisdiction of the court, ie, that the High Court in the instant case had no right to entertain the plaintiffs claim for declaration, the Court of Appeal having based itself solely on the
- e* *Healey case supra*, no doubt by relying on the submission of learned counsel for the defendants in the High Court, the nature of the preliminary point or objection coupled with the absence of any effort of the said counsel to make any other submission or any other point which the said counsel might rely and also that the instant case was tried and heard on the merits in the ordinary
- f* way with High Court, we conclude that this question or preliminary objection was the only question meant by the parties to be heard by the Court of Appeal. Any proposal for a hearing *de novo* before the Court of Appeal would be therefore out of place.

- g* I for myself would therefore allow the appeal with costs here and the courts below; setting aside the order of the Court of Appeal dated 11 October 1996 and restoring the order of High Court dated 20 July 1994. The deposit in court is to be refunded to the appellant.

h **Zakaria Yatim FCJ:**

I had the privilege of reading the draft judgment of the learned President of the Court of Appeal and the draft judgment of my learned brother Peh Swee Chin FCJ. I have nothing more to add and I concur in both judgments.

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